RECORD AND BRIEF

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# In the Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC., FKA GROUP HEALTH PLAN, INC., PETITIONER

*v.*

JODIE NEVILS

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTIONS PRESENTED

The federal government provides health insurance to federal workers pursuant to the Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 *et seq.* The Act authorizes the federal government to offer benefits and impose "limitations" and "other definitions of benefits." 5 U.S.C. 8902(d). The Act further provides that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law" relating to health insurance. 5 U.S.C. 8902(m)(1). Federal regulations provide that subrogation or reimbursement terms in such a contract impose a "condition of and a limitation on" benefits and benefits payments, "relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits)," and "are therefore effective notwithstanding any state or local law" relating to health insurance. 5 C.F.R. 890.106(b)(1) and (h). The questions presented are:

1. Whether a carrier may seek subrogation or reimbursement pursuant to the terms of its contract with the federal government, under 5 U.S.C. 8902(m)(1), notwithstanding state law prohibiting insurance subrogation.

2. Whether Section 8902(m)(1) is consistent with the Supremacy Clause, U.S. Const. Art. VI, Cl. 2.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

### INTEREST OF THE UNITED STATES

The federal government provides health insurance to federal employees, retirees, and their dependents, under the Federal Employees Health Benefits Act of 1959 (FEHB Act or Act), 5 U.S.C. 8901 *et seq.* This case presents the questions (i) whether subrogation or reimbursement clauses in FEHB contracts are effective under the Act's preemption provision, 5 U.S.C. 8902(m)(1), notwithstanding state law prohibiting insurance subrogation; and (ii) whether Section 8902(m)(1) is constitutional.

The United States has a substantial interest in the resolution of those questions. The federal government provides health benefits to more than eight million federal employees, retirees, and dependents under the FEHB program. 80 Fed. Reg. 29,203 (May 21, 2015). "The government's share of FEHB premiums in 2014

was approximately $33 billion." *Ibid.* "FEHB carriers were reimbursed by approximately $126 million in subrogation recoveries," which "translate to premium cost savings for the federal government and FEHB enrollees." *Ibid.* The federal government also has a "strong * * * interest" in ensuring that it can administer the FEHB program on a uniform basis, without variation based on a patchwork of state and local laws. 80 Fed. Reg. 932 (Jan. 7, 2015). At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at an earlier stage in this case. 135 S. Ct. 323 (2014).

## STATEMENT

1. The FEHB Act "establishes a comprehensive program of health insurance for federal employees." *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 682 (2006). Today, more than eight million federal workers, retirees, and dependents are enrolled in FEHB plans. 80 Fed. Reg. at 29,203.

The Act vests the Office of Personnel and Management (OPM) with broad authority to administer the FEHB program, see 5 U.S.C. 8901-8913, and to promulgate regulations necessary to carry out the Act's objectives, 5 U.S.C. 8913. OPM contracts with private insurance carriers to offer a range of healthcare plans. 5 U.S.C. 8902, 8903. The Act directs that each contract between OPM and a carrier "shall contain a detailed statement of benefits offered," and "shall include such maximums, limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable." 5 U.S.C. 8902(d).

Federal employees may enroll in a carrier's plan under the terms of the contract between OPM and the carrier. 5 U.S.C. 8905(a). OPM issues official descrip-

tions of plan terms through a statement of benefits or plan brochure. 5 U.S.C. 8907. The government pays the bulk of the premiums, 5 U.S.C. 8906(b)(1), which are deposited into the Employee Health Benefits Fund in the U.S. Treasury, 5 U.S.C. 8909.

The Act contains an express-preemption provision. It provides:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. 8902(m)(1). Congress originally enacted the provision in 1978 "to establish uniformity in Federal employee health benefits and coverage." H.R. Rep. No. 282, 95th Cong., 1st Sess. 1 (1977) (1977 House Report); see Act of Sept. 17, 1978 (1978 Act), Pub. L. No. 95-368, 92 Stat. 606. Congress broadened it to its current form in 1998, to ensure that "national plans [can] offer uniform benefits and rates to enrollees regardless of where they may live," and to "prevent carriers' cost-cutting initiatives from being frustrated by State laws." H.R. Rep. No. 374, 105th Cong., 1st Sess. 9 (1997) (1997 House Report); see Federal Employees Health Care Protection Act of 1998 (1998 Act), Pub. L. No. 105-266, § 3(c), 112 Stat. 2366.

2. Petitioner is a FEHB insurance carrier that has entered into a contract with OPM to furnish health benefits. At all relevant times, Part II of petitioner's contract with OPM (titled "BENEFITS"), Pet. App. 122a, contained a section titled "SUBROGATION," *id.* at 129a-130a. "Subrogation" occurs when an insurer pays an insured for benefits, and then steps into the

insured's shoes to demand repayment from a third party who caused the loss. See *Black's Law Dictionary* 1654 (10th ed. 2014). "[S]ubrogation rights will commonly subsume reimbursement," which occurs when the insurer demands repayment from an insured who has recovered twice for the same injury, once from the insurer and again from a third party who caused the loss. *New Orleans Assets, L.L.C.* v. *Woodward*, 363 F.3d 372, 377 (5th Cir. 2004).

The subrogation clause in petitioner's contract with OPM stated, among other things, that petitioner "shall subrogate FEHB claims" in a State where "subrogation is prohibited," if petitioner also "subrogates for at least one plan covered under" the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Pet. App. 130a; see *FMC Corp.* v. *Holliday*, 498 U.S. 52, 58 (1990) (ERISA preempts state anti-subrogation laws).[1] It is undisputed that the subrogation clause required petitioner to "seek reimbursement or subrogation" in Missouri "when an insured obtains a settlement or judgment against a tortfeasor for payment of medical expenses." Pet. App. 45a. It is also undisputed that the term "subrogation" in the contract encompasses reimbursement. See Pet. 8; Resp. Br. 7.

3. OPM has issued detailed regulations governing subrogation and reimbursement clauses in FEHB contracts. 5 C.F.R. 890.106; see 80 Fed. Reg. at 29,203. Those regulations provide that a carrier's "right to pursue and receive subrogation and reimbursement recoveries *constitutes a condition of and a limitation on* the nature of benefits or benefit pay-

[1] The plan brochure stated, "[i]f you do not seek damages you must agree to let us try. This is called subrogation." Pet. App. 147a.

ments and on the provision of benefits under the plan's coverage." 5 C.F.R. 890.106(b)(1) (emphasis added). The regulations further provide:

> A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1). *These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.*

5 C.F.R. 890.106(h) (emphasis added). This regulation "formalizes OPM's longstanding interpretation of what Section 8902(m)(1) has meant since Congress enacted it in 1978," and it applies to "all FEHBA contracts." 80 Fed. Reg. at 29,204.[2]

OPM explained that these regulations "comport[] with longstanding Federal policy and further[] Congress's goals of reducing health care costs and enabling uniform, nationwide application of FEHB contracts." 80 Fed. Reg. at 29,203. OPM noted that, in 2014, "FEHB carriers were reimbursed by approximately $126 million in subrogation recoveries," "translat[ing] to premium cost savings for the federal government and FEHB enrollees." *Ibid.* OPM also stated that the regulations further "a strong federal interest in national uniformity" in coverage, benefits,

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[2] OPM's regulations also require carrier contracts entered into after June 22, 2015, to specify that benefits and benefits payments are extended "on the condition" that the carrier may pursue and receive subrogation and reimbursement. 5 C.F.R. 890.106(b)(2); see 80 Fed. Reg. at 29,203-29,204.

and administration. 80 Fed. Reg. at 932. Disuniformity, OPM explained, "is administratively burdensome, gives rise to uncertainty and litigation, and results in treating enrollees differently, although enrolled in the same plan and paying the same premium." *Ibid.* OPM further stated that "Congress enacted the preemption provision to avoid such disparities, and to enhance the ability of the Federal Government to offer its employees a program of health benefits governed by a uniform set of legal rules." *Ibid.*

4. a. Respondent is a former federal employee who enrolled in and was insured under petitioner's FEHB plan. Pet. App. 45a. He was injured in an automobile accident, and petitioner paid his medical expenses. *Ibid.* Respondent sued the driver who caused his injuries and recovered a monetary award in a settlement. *Ibid.* As contemplated by its contract with OPM, petitioner asserted a lien (for $6,592.24) against part of the settlement proceeds to cover medical bills petitioner had paid arising from the accident. *Ibid.* Respondent repaid that amount, satisfying the lien. *Ibid.*

Respondent then brought this class action suit against petitioner in Missouri state court, alleging that petitioner had improperly obtained reimbursement for medical benefits it paid. Pet. App. 45a. Respondents' state-law claims were "based on the premise that Missouri law does not permit the subrogation of tort claims." *Ibid.*; see *Benton House, LLC* v. *Cook & Younts Ins., Inc.*, 249 S.W.3d 878, 882 (Mo. Ct. App. 2008) ("[A]n insurer cannot seek subrogation from its insured."). In response, petitioner argued that Section 8902(m)(1) makes subrogation and reimbursement clauses in FEHB contracts effective notwithstanding state law. The state trial court granted

summary judgment for petitioner, Pet. App. 28a-32a, and the state court of appeals affirmed, *id.* at 33a-43a.

The Missouri Supreme Court reversed. Pet. App. 44a-54a. The court started "with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 47a (brackets in original) (quoting *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). The court found Section 8902(m)(1) ambiguous as to whether subrogation and reimbursement were included within its preemptive scope. The court then concluded that it had "a duty to accept the reading that disfavors preemption." *Id.* at 49a (quoting *Bates* v. *Dow AgroSciences LLC*, 544 U.S. 431, 449 (2005)).

Judge Wilson concurred, joined by Judge Breckenridge. Pet. App. 55a-72a. He stated that "it defies logic to insist that benefit repayment terms do not *relate* to the nature or extent of [respondent's] benefits," and determined that "Congress plainly intended for § 8902(m)(1) to apply to the benefit repayment terms in [petitioner's] contract." *Id.* at 60a, 66a. Judge Wilson nonetheless concurred, reasoning that Congress cannot make the terms of FEHB contracts enforceable notwithstanding state law. *Id.* at 67a.

b. Petitioner filed a petition for a writ of certiorari, seeking this Court's review of the Missouri Supreme Court's decision. The Court invited the Solicitor General to file a brief expressing the views of the United States. 135 S. Ct. 323. While the petition was pending, OPM promulgated its regulations governing subrogation and reimbursement. See pp. 4-6, *supra*. This Court granted certiorari, vacated the Missouri Supreme

Court's decision, and remanded for further consideration in light of the new regulations. Pet. App. 73a.

c. On remand, the Missouri Supreme Court reaffirmed its prior ruling. Pet. App. 1a-13a. The court stated that the "OPM regulation does not overcome the presumption against preemption and demonstrate Congress' clear and manifest intent to preempt state law." *Id.* at 2a. But see *Bell* v. *Blue Cross & Blue Shield*, 823 F.3d 1198 (8th Cir. 2016) (finding state anti-subrogation law preempted), petition for cert. pending, No. 16-504 (filed Oct. 11, 2016); *Helfrich* v. *Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090 (10th Cir. 2015) (same); *Kobold* v. *Aetna Life Ins. Co.*, 370 P.3d 128 (Ariz. Ct. App. 2016) (same).

Judge Wilson concurred, joined by a majority of the judges of the Missouri Supreme Court. Pet. App. 14a; *id.* at 13a (identifying judges). In the concurring judges' view, Congress's "attempt to give preemptive effect to the provisions of a contract between the federal government and a private party is not a valid application of the Supremacy Clause" and, "therefore, does not displace Missouri law here." *Id.* at 14a.

## SUMMARY OF ARGUMENT

I. Subrogation and reimbursement clauses in FEHB contracts are effective notwithstanding state anti-subrogation laws because Congress has shielded FEHB contracts from state interference, 5 U.S.C. 8902(m)(1), and subrogation and reimbursement clauses fall within the scope of that protective umbrella.

OPM has recently promulgated regulations codifying its longstanding interpretation of the FEHB Act to have that effect. 5 C.F.R. 890.106(b)(1) and (h). That interpretation bars Missouri from prohibiting subrogation that a FEHB contract requires. *Ibid.*

Those regulations embody by far the best interpretation of the statute. At a minimum, they reasonably resolve any ambiguity and are therefore binding under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

A subrogation or reimbursement clause "relate[s] to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits)," 5 U.S.C. 8902(m)(1), because such a clause imposes a "condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage." 5 C.F.R. 890.106(b)(1). When subrogation is triggered, a carrier's payments to a beneficiary must be paid back. Moreover, Congress has assigned to OPM the power to decide what "limitations * * * and other definitions of benefits" a carrier contract "shall contain." 5 U.S.C. 8902(d). OPM has reasonably concluded that subrogation is such a "limitation" on benefits, 5 C.F.R. 890.106(b)(1), and therefore relates to the nature, provision, and extent of benefits and benefit payments under the FEHB Act's preemption provision, 5 U.S.C. 8902(m)(1). See 5 C.F.R. 890.106(h).

OPM's common-sense interpretation furthers Section 8902(m)(1)'s purposes. Congress enacted that provision to ensure that uniform, national rules will govern the administration of benefits for federal workers—and to prevent individual States from undermining the federal government's cost-cutting efforts or creating unfair disparities between similarly situated federal employees. If individual States could prohibit FEHB subrogation, the federal government would spend more money to insure federal employees, and federal employees who pay the same premiums

under the same plan would receive different benefits: Federal employees in anti-subrogation States would get to keep payments, whereas those in other States would have to pay them back. Out-of-state enrollees in the plan who cannot receive the advantages of an anti-subrogation law (the ability to keep benefit payments) would nonetheless suffer their disadvantage (the increased premiums needed to pay for those unreturned benefits)—and would cross-subsidize the expanded benefits received solely by in-state workers.

The Missouri Supreme Court disagreed, reasoning that a "presumption against preemption" applied and effectively trumped *Chevron*, leaving OPM powerless to interpret Section 8902(m)(1). Pet. App. 2a. That is wrong for three reasons, each of which independently warrants reversal. And collectively, they make it even clearer that the decision below is wrong.

First, this Court has repeatedly applied *Chevron* deference to regulations interpreting the substantive scope of a statutory provision that preempts state law. *E.g.*, *Cuomo* v. *Clearing House Ass'n*, 557 U.S. 519, 525 (2009); *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 743-744 (1996) (rejecting an argument that the presumption against pre-emption "in effect trumps *Chevron*"). A "general conferral of rulemaking authority * * * validate[s] rules for *all* the matters the agency is charged with administering." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1874 (2013). And the case for deference is particularly strong here because Congress has charged OPM with determining what "limitations" to impose and what "other definitions of benefits" to prescribe in its carrier contracts. 5 U.S.C. 8902(d). *Chevron* therefore applies to OPM's

interpretation of both Section 8902(m)(1) itself and the substantive terms in that provision.

Second, even without OPM's regulations, it would be improper to "presume" that Congress intended to preserve a role for state law under the FEHB program, because Congress enacted Section 8902(m)(1) to *prevent* state regulation that might interfere with its implementation. When a "statute 'contains an express pre-emption clause,'" the Court does "not invoke any presumption against pre-emption." *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce of the U.S.* v. *Whiting*, 563 U.S. 582, 594 (2011)).

Third, even overlooking *both* OPM's regulations *and* the express-preemption provision, a presumption against preemption would not apply: There is no basis for "presuming" that Congress wanted to allow States to regulate benefits under "a *federal* health insurance plan for *federal* employees that arise from a *federal* law." *Bell* v. *Blue Cross & Blue Shield*, 823 F.3d 1198, 1202 (8th Cir. 2016) (emphases added), petition for cert. pending, No. 16-504 (filed Oct. 11, 2016). "[A]n 'assumption' of nonpre-emption is not triggered when [a] State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). And "[i]t is an understatement to say that 'there has been a history of significant federal presence' in the area of federal employment." *Helfrich* v. *Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1105 (10th Cir. 2015).

II. The Act's express-preemption provision is constitutional. Although it is "unusual" for a statute to provide that the terms of a federal contract preempt state law, *Empire Healthchoice Assurance, Inc.* v.

*McVeigh*, 547 U.S. 677, 697 (2006), that creates no constitutional problem. Section 8902(m)(1) itself does the preempting here, with the reference to contract terms establishing the scope of the preemption. Section 8901(m)(1) thus creates a protective umbrella under which OPM can enter into contracts with carriers to provide uniform, nationwide coverage, sheltered from state interference. Congress plainly has the authority to create such a protected zone, and it has done so many times.

Indeed, this case involves an area of "uniquely federal interest" where uniform federal common law would apply—even without an express-preemption provision—when there is a "significant conflict" between state law and federal interests. *McVeigh*, 547 U.S. at 692-693 (quoting *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 507 (1988)). It follows *a fortiori* from *McVeigh* and *Boyle* that Congress can enact a statute declaring that uniform federal law will govern the terms and enforcement of FEHB contracts.

## ARGUMENT

### I. Section 8902(m)(1) Requires That Subrogation And Reimbursement Clauses In FEHB Contracts Be Given Effect Notwithstanding State Anti-Subrogation Laws

#### A. OPM's Regulations Embody By Far The Best Interpretation Of Section 8902(m)(1)

1. a. Congress has granted OPM authority to determine what health "benefits" a carrier will offer in a contract, and to include in the contract such "limitations" and "other definitions of benefits as [it] considers necessary or desirable." 5 U.S.C. 8902(d). And Congress has further provided that contract terms that "relate to the nature, provision, or extent of coverage or benefits (including payments with respect to

benefits) *shall supersede and preempt any State or local law* * * * which relates to health insurance or plans." 5 U.S.C. 8902(m)(1) (emphasis added). It is undisputed that Missouri's law prohibiting health-insurance subrogation "relates to health insurance or plans." *Ibid.* Accordingly, the only questions are (1) what is included in the "nature, provision, or extent of coverage or benefits (including payments with respect to benefits)" available under a FEHB contract; and (2) whether a subrogation clause "relate[s] to" the nature, provision, or extent of those benefits or benefit payments. *Ibid.*

OPM's regulations answer both questions. They provide that a carrier's "right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the nature of benefits or benefit payments and on the provision of benefits under the plan's coverage." 5 C.F.R. 890.106(b)(1).[3] OPM's regulations further provide that "[a] carrier's rights and responsibilities pertaining to subrogation and reimbursement" under a FEHB contract "relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits)" within the meaning of Section 8902(m)(1), and "*are therefore effective notwithstanding any state or local law*" relating to health insurance or plans. 5 C.F.R. 890.106(h) (emphasis added). Petitioner therefore may obtain subrogation according to the terms of its contract with OPM, notwithstanding Missouri law.

b. In *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006), this Court addressed

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[3] Contracts now must specify that benefits and benefits payments are extended "on the condition" that the carrier may pursue and receive subrogation and reimbursement. 5 C.F.R. 890.106(b)(2).

whether a FEHB carrier's action for subrogation and reimbursement arose under federal law, and thus could be bought in federal court under 28 U.S.C. 1331. In concluding that such an action did not arise under federal law, the Court described Section 8902(m)(1) as a "puzzling measure" that was "open to more than one construction"—including the interpretation OPM has adopted. *McVeigh*, 547 U.S. at 697-698. The Court explained that a "reimbursement clause" in a contract between OPM and a carrier could be interpreted as a "condition or limitation on 'benefits' received by a federal employee," and thus as a contract term "'relat-[ing] to . . . coverage or benefits' and 'payments with respect to benefits.'" *Id.* at 697 (brackets in original). On the other hand, the Court noted, Section 8902(m)(1) could be read to refer to a beneficiary's initial entitlement to benefits, not a carrier's entitlement to obtain reimbursement later. *Ibid.*

The Court did not definitively interpret Section 8902(m)(1) in *McVeigh*, however, because it would not be a basis for federal jurisdiction on either interpretation. 547 U.S. at 697. Section 8902(m)(1) is a "choice-of-law prescription," the Court concluded, not a "jurisdiction-conferring provision." *Ibid.*

*McVeigh* therefore left OPM with authority to adopt regulations definitively resolving the textual ambiguity the Court found as to whether subrogation and reimbursement clauses fit within Section 8902(m)(1)'s terms. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). OPM has now exercised that authority, issuing regulations providing that a carrier's "right to pursue and receive subrogation and reimbursement recoveries constitutes a condition of and a limitation on the na-

ture of benefits or benefit payments and on the provision of benefits under the plan's coverage." 5 C.F.R. 890.106(b)(1); see 5 C.F.R. 890.106(h) (such terms are "effective notwithstanding any state or local law").

c. OPM's interpretation is the most natural reading of the statutory language. A subrogation or reimbursement clause is a "limitation[]" that serves to "defin[e]" the "benefits" that a plan offers, 5 U.S.C. 8902(d), by imposing a "condition of and a limitation on" those benefits and benefit payments, and thus on the provision of those benefits, 5 C.F.R. 890.106(b)(1). It does so by making benefits and benefit payments contingent rather than final: When subrogation is triggered, the benefits paid by the carrier must be paid back. The common sense of this understanding is confirmed by the Medicare secondary-payer statute, which provides that Medicare payments are "conditioned on reimbursement" and must be repaid if the recipient later receives payment from another plan. 42 U.S.C. 1395y(b)(2)(B) ("Conditional Payment").

Subrogation and reimbursement clauses in turn "relate to" the "nature, provision, or extent" of those benefits and benefit payments for purposes of Section 8902(m)(1). The ordinary meaning of the phrase "relate to" "is a broad one," meaning "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)); see *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1428, 1430-1431 (2014) (the phrase "related to" in an express-preemption provision "expresses a 'broad pre-emptive purpose'"). As set forth above, subrogation and reimbursement clauses "limit[]" and

"defin[e]" the benefits that are provided in the first place. 5 U.S.C 8902(d). Such a clause imposes a "limitation" on benefits and any payments with respect to those benefits, *ibid.*, making them conditional in "nature" rather than final: When subrogation is triggered, benefits paid by a carrier must be paid back. And they also define the "extent" of benefits and payments with respect to benefits, because they define the extent of the payments the insured can keep. Subrogation clauses therefore relate to the "nature, provision, or extent" of the "benefits" themselves, as well as to the "nature, provision, or extent" of "payments with respect to benefits." 5 U.S.C. 8902(m)(1).

That conclusion is consistent with this Court's cases. This Court has held that a state "antisubrogation law 'relate[s] to' an employee benefit plan," within the meaning of ERISA's preemption clause. *FMC Corp.* v. *Holliday*, 498 U.S. 52, 58 (1990) (brackets in original). There is no basis for concluding that Congress intended a broader role for state law—and thus less uniformity—in regulating the *federal government's* relationship with *federal* employees than in regulating private retirement plans under ERISA. The fact that a payment may need to be refunded is closely "connected to" and "associated with" the nature and extent of both the benefits themselves and any payment of benefits that was made in the first place.

It is thus no surprise that the courts of appeals that have considered OPM's regulations have likewise concluded that they set forth the best reading of the statute. See *Bell* v. *Blue Cross & Blue Shield*, 823 F.3d 1198, 1203 (8th Cir. 2016) ("[T]he better reading of the statute" is that "reimbursement and subrogation provisions are limitations on the payment of bene-

fits."), petition for cert. pending, No. 16-504 (filed Oct. 11, 2016); *Helfrich* v. *Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1106 (10th Cir. 2015) ("[T]he best construction of the preemption provision * * * strongly support[s] Blue Cross" because "an enrollee's ultimate entitlement to benefit payments is conditioned upon providing reimbursement from any later recovery or permitting the Plan to recover on the enrollee's behalf"); see also *Kobold* v. *Aetna Life Ins. Co.*, 370 P.3d 128, 132 (Ariz. Ct. App. 2016) ("The connection between issuing benefit payments and seeking subrogation and reimbursement is not so attenuated as to make the regulations' interpretation unreasonable."). And in his original concurring opinion below, Judge Wilson stated that it "defies logic to insist that benefit repayment terms do not *relate* to the nature or extent of [respondent's] benefits": "[T]erms requiring [him] to *pay* benefits back to [petitioner] that [petitioner] previously had *paid* out are terms that relate to 'payment with respect to [his] benefits.'" Pet. App. 60a-61a.

2. The interpretation embodied in OPM's regulations also directly furthers Section 8902(m)(1)'s purposes of "promot[ing] uniformity in the administration of federal employee benefits and stewardship of the public fisc." *Bell*, 823 F.3d at 1204.

a. Congress enacted Section 8902(m)(1) in response to state laws "requiring not only specific types of care but the extent of benefits, family members to be covered, the age limits for family members, extension of coverage, [and] the format and the type of informational material that must be furnished, including in some instances the type of language to be used." 1977 House Report 6-7. Congress was concerned that

such "mandated benefit" laws would result in "[i]ncreased premium costs to both the Government and enrollees," as well as "[a] lack of uniformity of ben[e]fits for enrollees in the same plan which would result in enrollees in some States paying a premium based, in part, on the cost of benefits provided only to enrollees in other States." H.R. Rep. No. 1211, 94th Cong., 2d Sess. 3 (1976); see S. Rep. No. 903, 95th Cong., 2d Sess. 7 (1978) ("These laws in effect presented serious problems from the standpoint of the uniformity of benefits under the program."). Congress accordingly provided in 1978 that FEHB contract terms that "relate to the nature or extent of coverage or benefits (including payments with respect to benefits)" preempt any state law relating to health insurance or plans, "to the extent that such law or regulation is inconsistent with such contractual provisions." 1978 Act, 92 Stat. 606.

Congress later expanded the preemption provision. See 1998 Act § 3(c), 112 Stat. 2366. First, Congress expanded it to preempt state laws without regard to whether they are "inconsistent" with FEHB contracts terms, "thereby giving the federal contract provisions clear authority." S. Rep. No. 257, 105th Cong., 2d Sess. 15 (1998) (1998 Senate Report). Second, Congress expanded it to reach terms relating to the "provision" of coverage or benefits. 5 U.S.C. 8902(m)(1). Congress thereby "strengthen[ed] the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," and "prevent[ed] carriers' cost-cutting initiatives from being frustrated by State laws." 1997 House Report 9; see *McVeigh*, 547 U.S. at 686 (describing this history).

b. OPM's interpretation of Section 8902(m)(1) advances Congress's goals of "reducing health care costs and enabling uniform, nationwide application of FEHB contracts," by ensuring that subrogation and reimbursement clauses are uniformly enforceable and effective regardless of where the federal employee resides. 80 Fed. Reg. at 29,203.

"The FEHB program insures approximately 8.2 million federal employees, annuitants, and their families, a significant proportion of whom are covered through nationwide fee-for-service plans with uniform rates." 80 Fed. Reg. at 29,203. OPM estimated that "FEHB carriers were reimbursed by approximately $126 million in subrogation recoveries" in 2014. *Ibid.* Accordingly, "[s]ubrogation recoveries translate to premium cost savings for the federal government and FEHB enrollees." *Ibid.*

OPM's regulations similarly further Congress's purpose of promoting national uniformity in coverage, benefits, and administration. 80 Fed. Reg. at 932; cf. *Holliday*, 498 U.S. at 60 ("Application of differing state subrogation laws to [ERISA] plans would * * * frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide."). Disuniformity "is administratively burdensome, gives rise to uncertainty and litigation, and results in treating enrollees differently, although enrolled in the same plan and paying the same premium." 80 Fed. Reg. at 932. Federal employees "in states without [anti-subrogation] laws would have to pay reimbursements that are then used to benefit enrollees throughout the country, even those who live in states where they could keep their tort recoveries without paying reimbursements." *Helfrich*, 804 F.3d at 1099. Depending

on where they lived, federal employees insured under the same plan and paying the same premiums would obtain different benefits under different conditions and limitations, and would be able to keep different payment amounts. The disuniformity here thus would result in unfairness and real-world financial harm to federal employees.

"Congress enacted the preemption provision to avoid such disparities, and to enhance the ability of the Federal Government to offer its employees a program of health benefits governed by a uniform set of legal rules." 80 Fed. Reg. at 932; see *Helfrich*, 804 F.3d at 1099. Indeed, Missouri's anti-subrogation rule is indistinguishable in this respect from the state mandated-benefit laws that Congress enacted the preemption provision to target: Those laws created the same kind of disuniformity, increased costs, and unfair cross-subsidization. See pp. 17-18, *supra*.

**B. OPM's Regulations Are Authoritative**

At the very least, OPM's regulations reasonably interpret the relevant provisions of the FEHB Act, and are therefore controlling under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843-844 (1984). Indeed, no court has held that OPM's interpretation is unreasonable. See Pet. App. 3a (describing it as "plausible"); Resp. Mo. Sup. Ct. Br. 31, 36 (same). OPM issued its regulations pursuant to express authority to issue regulations to carry out the Act, 5 U.S.C. 8913(a), which includes not only the preemption provision, 5 U.S.C. 8902(m)(1), but also the grant of authority to prescribe the "benefits offered" as well as the "limitations" and "other definitions of benefits as [it] considers necessary or desirable," 5 U.S.C. 8902(d). This Court has held that,

where Congress has granted an agency authority to prescribe definitions of terms in a statute, the agency's rules exercising that authority are entitled to heightened deference. See *Chevron*, 467 U.S. at 843-844 & n.12 (citing, *inter alia*, *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977)).

The Missouri Supreme Court nonetheless "decline[d]" to provide *any* deference to OPM's regulations, on the theory that *Chevron* deference does not apply to regulations interpreting an express-preemption provision. Pet. App. 5a. The court then relied on a "presumption against preemption" to definitively foreclose OPM's interpretation. *Id.* at 2a; see *id.* at 3a ("[T]he 'historic police powers of the States' are generally preempted only when the federal statute at issue indicates that preemption is the 'clear and manifest purpose of Congress.'") (quoting *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)).

That approach is fundamentally misguided and conflicts with this Court's holdings that (1) *Chevron* applies to regulations interpreting substantive terms in statutory provisions that have preemptive effect; (2) a "presumption against preemption" does not apply to when interpreting an express-preemption provision; and (3) a "presumption against preemption" does not in any event apply in an area like this, with a history of significant federal presence. Each of those errors independently warrants reversal. Collectively, they make the decision below clearly wrong.

1. This Court recently rejected an argument, similar to the one the Missouri Supreme Court adopted below, that *Chevron* applies to some parts of a statute an agency is charged with administering, but not to others. Rather, a "general conferral of rulemaking

authority * * * validate[s] rules for *all* the matters the agency is charged with administering." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1874 (2013). "[T]he whole includes all of its parts." *Ibid.* Indeed, in *City of Arlington*, the Court specifically noted that it had deferred to an agency "assertion that its broad regulatory authority extends to preempting conflicting state rules." *Id.* at 1871 (citing *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988), and *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984)).

*Chevron* accordingly applies here. OPM's rulemaking authority under Section 8913(a) encompasses all of the Act's parts—including its preemption provision, 5 U.S.C. 8902(m)(1), as well as its grant of authority to OPM to determine what benefits to offer and what "limitations" and "other definitions of benefits" to impose, 5 U.S.C. 8902(d). And OPM's authority under the latter provision necessarily encompasses authority to flesh out the substantive terms that appear in the preemption provision, namely, "the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)." 5 U.S.C. 8902(m)(1).

This Court has consistently relied on *Chevron* when analyzing regulations that interpret the substantive scope of federal statutes that preempt state law. See *Cuomo* v. *Clearing House Ass'n*, 557 U.S. 519, 525 (2009); *New York* v. *FERC*, 535 U.S. 1, 28 (2002); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996); *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739-744 (1996). For example, in *Smiley*, the Court applied *Chevron* to defer to a regulation interpreting the term "interest" in 12 U.S.C. 85, a provision that the Court had previously held was preemptive. *Smiley*, 517 U.S. at 737-745. The Court declined to decide whether *Chevron*

would apply to "the question of *whether* a statute is pre-emptive." *Id.* at 744. But the Court explained that that was "*not* the question at issue," because "there [wa]s no doubt that § 85 pre-empts state law." *Ibid.* Rather, the only question in the case was "the substantive (as opposed to pre-emptive) *meaning* of a statute," namely, the meaning of "interest." *Ibid.* The Court applied *Chevron* deference to the agency's interpretation of that term: The "regulation deserves deference," the Court stated, and was "obviously" reasonable. *Id.* at 745. And "the presumption against . . . pre-emption," the Court explained, does not "trump[] *Chevron*." *Id.* at 744 (citation omitted).

Similarly, in *Lohr*, the Court relied on *Chevron* to give "substantial weight" to the Food and Drug Administration's interpretation of what constitutes a "requirement" within the meaning of the express-preemption provision of the Medical Device Amendments of 1976, 21 U.S.C. 360k. *Lohr*, 518 U.S. at 496. And in *Clearing House*, the Court unanimously agreed that the *Chevron* framework applied to a regulation interpreting the phrase "visitorial powers" in an express-preemption provision, 12 U.S.C. 484(a), concluding that the agency could "give authoritative meaning to the statute within the bounds of [the] uncertainty" as to that phrase's meaning. *Clearing House*, 557 U.S. at 525; see *id.* at 538 (Thomas, J., concurring in part and dissenting in part) (the regulation "falls within the heartland of *Chevron*"). The Court ultimately held that the agency had stretched the statute beyond its "outer limits." *Id.* at 525. But *Chevron* defined where those "outer limits" were placed: The question was whether the regulation

could "be upheld as a *reasonable* interpretation of the National Bank Act." *Id.* at 523-524 (emphasis added).

OPM's regulations warrant deference here for the same reasons. As in *Smiley*, *Lohr*, and *Clearing House*, there is no doubt that the statutory provision at issue (Section 8902(m)(1)) triggers preemption. The only question is a substantive question about its scope: whether a subrogation clause "relate[s] to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)." 5 U.S.C. 8902(m)(1). OPM's conclusion that subrogation rights impose a "condition of and a limitation on" benefits and benefit payments, and therefore relate to the nature, provision, and extent of benefits or benefit payments, 5 C.F.R. 890.106(b)(1) and (h), is embodied in "a full-dress regulation" that was "adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act." *Smiley*, 517 U.S. at 741. OPM's interpretation also lies at the heart of the agency's responsibilities and expertise under the FEHB Act. OPM's regulations therefore are "authoritative." *Clearing House*, 557 U.S. at 525.[4]

2. Even without OPM's regulations, it would be incorrect to "presume" that Congress wanted to permit state regulation of subrogation and reimbursement required under FEHB contracts and OPM regulations, because Congress enacted Section 8902(m)(1) for the very purpose of preventing state interference

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[4] At a minimum, OPM's "experience[d] and informed judgment" is entitled to a "measure of respect" sufficient to uphold its interpretation. *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Skidmore* v. *Swift*, 323 U.S. 134, 140 (1944)). See *Helfrich*, 804 F.3d at 1109-1110 (adopting OPM's interpretation under *Skidmore* without deciding whether *Chevron* would apply).

with OPM's administration of this national program. When a "statute 'contains an express pre-emption clause,'" the Court does "not invoke any presumption against pre-emption but instead 'focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce of the U.S.* v. *Whiting*, 563 U.S. 582, 594 (2011)); see *Gobeille* v. *Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 946 (2016) (ERISA "certainly contemplated the pre-emption of substantial areas of traditional state regulation.") (citation omitted).

The one-two punch of giving no deference to OPM's interpretation of Section 8902(m)(1) and its substantive terms, coupled with applying a "presumption against preemption" to narrow Section 8902(m)(1), is particularly problematic. That approach would render the expert federal agency powerless to interpret the scope of a statutory provision that could have a significant effect on its ability to implement, on a nationwide basis, the program Congress has charged it with administering. Congress used broad phrasing in Section 8902(m)(1) precisely to give broad protection for OPM and carriers against state interference in prescribing, implementing, and enforcing contract terms. But because Section 8902(m)(1) paints with a broad brush, it may be ambiguous whether a particular kind of contract provision falls within its aegis. Application of a "presumption against preemption" that trumps *Chevron* thus would be a one-way ratchet, leading to more and more cramped interpretations of Section 8902(m)(1)—and thus permitting more and more of the state interference Congress enacted it to prevent.

3. Even ignoring both OPM's regulations and Section 8902(m)(1), there would be no "presumption" favoring state regulation here, because "this dispute concerns benefits from a *federal* health insurance plan for *federal* employees that arise from a *federal* law." *Bell*, 823 F.3d at 1201-1202 (emphases added). "[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000). For example, in *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), this Court held that no presumption against preemption applied when a State sought to impose common-law fraud duties upon "the relationship between a federal agency and the entity it regulates." *Id.* at 347. That relationship "is inherently federal," the Court explained, because it "originates from, is governed by, and terminates according to federal law." *Ibid.*; see *Locke*, 529 U.S. at 108 (declining to apply a presumption against preemption of state regulations touching upon "national and international maritime commerce").

"It is an understatement to say that 'there has been a history of significant federal presence' in the area of federal employment." *Helfrich*, 804 F.3d at 1105 (citation omitted). "Congress has legislated on the matter from the outset." *Ibid.* And, as in *Buckman*, the relationship among the federal government, an insurance carrier that has contracted with the federal government to furnish health benefits to federal employees, and those employees, "is inherently federal" because it "originates from, is governed by, and terminates according to federal law." 531 U.S. at 347.

As a result, application of a presumption against preemption is exactly backwards: "The conflict with federal policy *need not be as sharp* as that which must exist for ordinary preemption when Congress legislates 'in a field which the States have traditionally occupied.'" *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 507 (1988) (emphasis added) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Preemption is thus more likely here, not less.

Accordingly, there can be no "presumption" in favor of allowing States to regulate the terms upon which the federal government provides benefits to federal workers pursuant to a federal contract entered into under a federal statute. Congress enacted the express-preemption provision precisely to confirm that OPM can administer FEHB plans free from state interference. And "there is hardly an area in which a state would have less of a legitimate interest than this employment relationship." *Helfrich*, 804 F.3d at 1100.

## II. Congress Has Ample Constitutional Authority To Shield FEHB Contracts From State Interference

Section 8902(m)(1)'s wording is "unusual" because it states that "[t]he terms" of a federal contract "shall supersede and preempt" state law. *McVeigh*, 547 U.S. at 697; 5 U.S.C. 8902(m)(1). But that language is not unique, 5 U.S.C. 8959, 8989, 9005(a); see 10 U.S.C. 1103(a); 49 U.S.C. 10709(b), and it does not create any constitutional problem.

1. Section 8902(m)(1) is properly understood to do the preempting itself, with the reference to contract terms defining the scope of the preemption. Section 8902(m)(1) thereby provides a protective umbrella under which OPM can contract with carriers on a uniform national basis, without interference by a

patchwork of state and local law. So long as FEHB contract terms "relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)," Section 8902(m)(1) ensures that those terms will be uniformly enforceable nationwide, notwithstanding any state law relating to "health insurance or plans." 5 U.S.C. 8902(m)(1). And an easy, shorthand way of ensuring that an agency's contracts will be governed by uniform federal law is to enact a statute declaring that the agency's contracts "shall supersede and preempt" state law. *Ibid.* But it is still the statute, not the contract itself, that does the preempting.

Section 8902(m)(1) is reasonably interpreted in this uncontroversial manner, which is faithful to Congress's purpose. See *Bell*, 823 F.3d at 1204 ("[T]he statute can reasonably be construed to mean that federal law," not "the contractual terms, has the preemptive force."); *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 396 F.3d 136, 144-145 (2d Cir. 2005) (Sotomayor, J.) (similar), aff'd 547 U.S. 677 (2006); OPM, *FEHB Program Carrier Letter No. 2012-18*, at 1 (June 18, 2012) ("[FEHBA] preempts state laws prohibiting or limiting subrogation and reimbursement") (Pet. App. 116a).

This interpretation eliminates any conceivable constitutional doubt. Section 8902(m)(1) is a "Law[] of the United States" within the meaning of the Supremacy Clause. U.S. Const. Art. VI, Cl. 2. And "[i]t is the very essence of supremacy * * * to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Indeed, the Constitution itself provides simi-

lar protection from state interference in some contexts. *Ibid.*; *e.g.*, *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982) (private parties may be constitutionally immune from state taxation when acting pursuant to a federal contract); *Arizona* v. *California*, 283 U.S. 423, 451 (1931) ("The United States may perform its functions without conforming to the police regulations of a state."); *Helfrich*, 804 F.3d at 1100 n.7 (collecting cases). Federal common law does as well. *E.g.*, *Boyle*, 487 U.S. at 504 ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law.").

Congress has enacted many laws providing a protective umbrella for both private and public action, similar to that afforded by Section 8902(m)(1). This Court recently and unanimously found preemption under the Federal Employees' Group Life Insurance Act of 1954, 5 U.S.C. 8709(d)(1), which provides that "[t]he provisions of any contract" under that Act "shall supersede and preempt" state law. *Ibid.*; see *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1948 (2013). Under the "filed rate doctrine," Congress has enabled sellers of electricity and natural gas to set rates (and the government to approve those rates), without state interference. See *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003); *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 578-579 (1981). The Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. 14501(c)(1) and 41713(b)(4)(A), enables private air and motor carriers to establish rates, routes, and services, without state interference. See *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008). ERISA enables private parties to form employee benefit plans, protected from state

inference. 29 U.S.C. 1144(a); see *Gobeille*, 136 S. Ct. at 942-947. And the Federal Arbitration Act, 9 U.S.C. 2, enables private parties to agree to arbitration, protected from state interference. See *Preston* v. *Ferrer*, 552 U.S. 346, 349-350 (2008).

Section 8902(m)(1) does essentially the same thing for OPM and the carriers that provide federal benefits to federal employees. Indeed, if the federal government itself did all the carriers' work in-house, there would be no question that its subrogation efforts would be immune from state interference. Congress is not disabled from providing the same protection from state interference when it chooses to furnish the same benefits through contracts with private carriers.

2. In any event, Congress has the power to declare that the terms of a FEHB contract themselves preempt state law. Even absent "a clear statutory prescription," the terms of a federal contract can displace state law. *Boyle*, 487 U.S. at 504. In *Boyle*, the Court held that design specifications in a federal procurement contract for a military helicopter preempted a state-law tort suit against the contractor alleging that the design was defective. The Court explained that "obligations to and rights of the United States under its contracts are governed exclusively by federal law." *Ibid.*; see *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943). And although the dispute in *Boyle* was "between private parties," the Court found it "plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one." 487 U.S. at 506.

This Court recognized in *McVeigh* that, under *Boyle*, federal common law would govern the terms of a FEHB contract—and thus that the contract terms

would preempt state law—if a "significant conflict" were demonstrated "between an identifiable federal policy or interest and the operation of state law." 547 U.S. at 692-693 (quoting *Boyle*, 487 U.S. at 507); cf. *McVeigh*, 396 F.3d at 142 ("We recognize the possibility that at a later stage in the proceedings, a significant conflict might arise between New York state law and the federal interests underlying FEHBA.").

OPM's regulations embody its expert determination that a significant conflict exists. See 80 Fed. Reg. at 932 (application of state anti-subrogation laws to FEHB contracts conflicts with "major goals of Congress" in cost-savings and uniformity); cf. *Boyle*, 497 U.S. at 511 (relying on a federal statute as evidence of a "significant conflict"). Indeed, "[t]he conflict between the state regulation and the federal contractual requirement" here "is a stark one, starker than in *Boyle*." *Helfrich*, 804 F.3d at 1099. "In *Boyle*, the prospect of tort liability could deter a contractor from doing the government's bidding or cause it to raise the contract price. Here, state law outright forbids [the carrier] from fulfilling its contractual obligation" to subrogate. *Ibid.*

Congress enacted and expanded Section 8902(m)(1) to ensure that OPM could implement the FEHB program free from state interference by providing that the contract terms supersede state law, without any need to demonstrate an inconsistency on a case-by-case basis. See pp. 17-18, *supra*. It follows *a fortiori* from *McVeigh* and *Boyle* that Section 8920(m)(1) is constitutional: Congress has the constitutional authority to clarify and confirm that uniform federal law governs FEHB contract terms, when uniform federal law might govern those same terms even without a

statute. "[F]ederal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (quoting *United States* v. *Yazell*, 382 U.S. 341, 354 (1966)). There is no basis for concluding that federal courts have the authority to determine that "controlling federal rules" of a uniform nature must apply in this context, *ibid.*, but that Congress cannot make that same determination itself to "giv[e] the federal contract provisions clear authority." 1998 Senate Report 15.

## CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted.

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